

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TESLA, INC.

and

MICHAEL SANCHEZ, an Individual

Case No. 32-CA-197020

and

JONATHAN GALESCU, an Individual

Case No. 32-CA-197058

and

RICHARD ORTIZ, an Individual

Case No. 32-CA-197091

and

**INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL WORKERS OF
AMERICA, AFL-CIO**

Case No. 32-CA-197197

Case No. 32-CA-200530

Case No. 32-CA-208614

Case No. 32-CA-210879

**RESPONDENT TESLA, INC.'S BRIEF OPPOSING THE GENERAL COUNSEL'S
CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Mark S. Ross
mross@sheppardmullin.com
Keahn N. Morris
kmorris@sheppardmullin.com
SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP
4 Embarcadero Center, 17th Floor
San Francisco, CA 94111
Telephone: (415) 434-9100

Attorneys for Tesla, Inc.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. THE ALJ PROPERLY FOUND THAT TESLA’S CONFIDENTIALITY ACKNOWLEDGEMENT WAS LAWFUL.....	3
A. FACTUAL BACKGROUND.....	3
1. TESLA’S EMPLOYEES ARE GIVEN ACCESS TO SENSITIVE COMPANY-INTERNAL INFORMATION	3
2. EVEN THOUGH TESLA SHARES BUSINESS SENSITIVE INFORMATION WITH ITS WORKFORCE, IT TAKES STEPS TO KEEP THAT INFORMATION CONFIDENTIAL AND TO PREVENT THE LEAKING OR DISCLOSURE OF SAID INFORMATION TO THIRD PARTIES.....	4
3. DESPITE TESLA’S MANY EFFORTS TO PREVENT LEAKS, SENSITIVE COMPANY-INTERNAL BUSINESS INFORMATION GETS LEAKED TO PERSONS/THIRD PARTIES OUTSIDE THE COMPANY (THE BLOOMBERG LEAK).....	7
4. AS A RESULT OF THE BLOOMBERG LEAK, TESLA’S GENERAL COUNSEL DIRECTS THAT A CONFIDENTIALITY ACKNOWLEDGEMENT REMINDING EMPLOYEES OF THEIR CONFIDENTIALITY OBLIGATIONS AND CALLING ON THEM TO REAFFIRM THEIR PRIOR CONFIDENTIALITY COMMITMENTS BE DRAFTED AND DISTRIBUTED TO THE ENTIRE TESLA WORKFORCE	9
5. BEGINNING ON OCTOBER 11, TESLA PUBLISHES A CONFIDENTIALITY ACKNOWLEDGEMENT AND ASKS EMPLOYEES TO SIGN IT.....	10
B. LEGAL ANALYSIS.....	11
1. THE ALJ PROPERLY FOUND THAT REASONABLE EMPLOYEES WOULD UNDERSTAND THE CONFIDENTIALITY ACKNOWLEDGEMENT TO BE LIMITED TO PROPRIETARY INFORMATION	11
C. EVEN IF THE EXCEPTED TO LANGUAGE IN THE CONFIDENTIALITY AGREEMENT INFRINGES ON EMPLOYEES’ SECTION 7 RIGHTS, THE ALJ PROPERLY FOUND THAT TESLA HAD LEGITIMATE BUSINESS JUSTIFICATIONS TO OVERRIDE THOSE RIGHTS	18

III.	THE GC’S REQUEST TO REVISE THE ALJ’S REMEDY TO REQUIRE A NATIONWIDE POSTING AND “DELETION” OF A TWEET IS NOT SUPPORTED BY FACT OR LAW	20
A.	THE ALJ LIMITED ANY NOTICE POSTING TO THE FREMONT FACILITY BECAUSE THE ONLY VIOLATIONS WERE AT THE FREMONT FACILITY	20
B.	THE ALJ MADE NO FINDINGS THAT THE TWEET WAS AKIN TO AN UNLAWFUL RULE OR POLICY AND ANY REMEDY BASED UPON THIS FALSE SUPPOSITION MUST BE DENIED	22
C.	THERE IS NO LEGAL OR FACTUAL BASIS TO MODIFY THE ALJ’S REMEDY TO REQUIRE TESLA TO ORDER NON-PARTY ELON MUSK TO DELETE THE TWEET	24
IV.	THE GC’S CROSS-EXCEPTIONS CONCERNING THE REMEDY AS TO JOSE MORAN’S AND RICHARD ORTIZ’S DISCIPLINE ARE MOOT	25
V.	CONCLUSION.....	25

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Argos USA LLC</i>	
369 NLRB No. 26 (2020)	2, 12
<i>AT&T</i>	
362 NLRB 885 (2015)	20
<i>Boch Honda</i>	
362 NLRB 706 (2015)	21
<i>Chicago Teachers Union</i>	
367 NLRB No. 50 (2018)	24
<i>Consolidated Edison Company</i>	
323 NLRB 910-912 (1997)	21
<i>Fry's Food Stores</i>	
361 NLRB 1216 (2014)	21
<i>International Business Machines Corp.</i>	
265 NLRB 638 (1982)	19
<i>LA Specialty Produce Company</i>	
368 NLRB No. 93 (2019)	<i>passim</i>
<i>Lutheran Heritage Village-Livonia</i>	
343 NLRB 646 (2004)	11
<i>Macy's, Inc.</i>	
365 NLRB No. 116 (2017)	19
<i>National Indemnity Company</i>	
368 NLRB No. 96 (2019)	12, 13
<i>Promedica Health Sys., Inc.</i>	
343 NLRB 1351 (2004)	21
<i>S.E.C. v. Clark</i>	
915 F.2d 439 (9th Cir. 1990)	4
<i>The Boeing Company</i>	
365 NLRB No. 154 (2017)	1, 11

I. INTRODUCTION

On September 27, 2019, Administrative Law Judge Amita Tracy (ALJ) issued her decision in the above-captioned matters, correctly concluding that Tesla, Inc.'s (Tesla or Company) so-called Confidentiality Acknowledgement¹ (issued in October 2016) did not violate Section 8(a)(1) and recommending the dismissal of Paragraph 7(a) of Counsel for the General Counsel's (GC) complaint. Judge Tracy found that "considering the totality of the circumstances, . . . reasonable employees would understand the Confidentiality [Acknowledgement] to be limited to proprietary information" and, thus, not an infringement on their Section 7 rights. (ALJD 14:25-27) In doing so, the ALJ appropriately reasoned that the challenged provisions of the Confidentiality Acknowledgment "cannot be read in isolation" and must be considered in the full context of the Confidentiality Acknowledgement itself, as well as "the events at the time," including Tesla's emails regarding the Confidentiality Acknowledgment and the conversations by the HR Partners with employees explaining that the reaffirmation was due to "leaks of proprietary information at the workplaces" which could negatively impact the Company. (ALJD 14:29-30) Additionally, she found that, "even if the Confidentiality [Acknowledgement] infringes on employees' Section 7 rights, [Tesla] presented legitimate business justification to override these rights." (ALJD 14:29-30) In particular, the ALJ found that Tesla had legitimate concerns with "maintain[ing] security of its confidential proprietary information" as an employer in the automotive industry, that Tesla asked all employees to "acknowledge[] their obligation to maintain confidentiality when they were hired," that Tesla "suffered a series of information leaks which were critical to its success" in August 2016, that

¹ While both the ALJ and Counsel refer to this document as a Confidentiality Agreement, a plain reading of the document shows that calling or treating the document as an agreement is not accurate and that the document was no more than an acknowledgement or reminder of the employee's prior commitment to confidentiality. Indeed, nowhere in the document does the title "Confidentiality Agreement" appear. Instead, as stated in its introductory paragraph and the paragraph immediately above the document's signature line, the plainly worded, one page document served as a reminder of the confidentiality commitments that all Tesla employees agreed to at the time of their hire and a request that employees reaffirm those prior commitments. Accordingly, notwithstanding the ALJ's and GC's reference to the document as a "Confidentiality Agreement," we refer to it as a "Confidentiality Acknowledgement."

Tesla “asked employees to reaffirm their commitment to not leaking or disclosing confidential information,” and that Tesla “sought to ensure every employee understood the reasons for why they needed to reiterate this rule” when Tesla rolled out the Confidentiality Acknowledgment. (ALJD 14:31-45) The ALJ further rejected the GC’s and the Union’s claims that Tesla issued the Confidentiality Acknowledgement in response to or as a device for quelling on-going union organizing, finding there to be no evidence establishing a linkage between the Union’s organizing and the issuance of the Confidentiality Acknowledgement and the absence of any evidence that Tesla even knew of the Union’s organizing when it issued the Acknowledgement. (ALJD 15:1-11)

In his Amended² Limited Cross-Exceptions as the ALJ’s findings and conclusions concerning Complaint Paragraph 7(a), the GC takes exception to the ALJ’s failure to invalidate Tesla’s use of the following text in the Confidentiality Acknowledgement: “regardless of whether information has already been made public, it is never OK to communicate with the media or someone closely related to the media about Tesla unless you have been specifically authorized in writing to do so.” The GC fails to address, much less consider, Tesla’s legitimate business interests in safeguarding its proprietary information and preventing employees from leaking material, non-public information which may jeopardize its position in the marketplace and give competitors an unfair advantage. Rather than address the ALJ’s carefully reasoned findings and conclusions of law, the GC reads the challenged text in isolation and without regard to the context and surrounding circumstances in which it was used in the Confidentiality Acknowledgement, mischaracterizing it as a “blanket” prohibition on employee communication with the media and arguing it to be an unlawful Category 3 rule under *Boeing* because it

² Initially, the GC also excepted to the ALJ’s finding that employees would reasonably view Tesla’s Confidentiality Acknowledgement to be limited to proprietary information because of its reference to “employee information.” However, on February 12, 2020, the GC moved to withdraw that exception in light of the Board’s recent decision in *Argos USA LLC*, 369 NLRB No. 26 (February 5, 2020). Accordingly, that “employee information” exception is not before the Board and, thus, not addressed in this Opposition. Indeed, in *Argos*, the Board found that a confidentiality rule which included a reference to “employee information” was a per se lawful category 1(a) workplace rule under *The Boeing Company*, 365 NLRB No. 154 (2017).

allegedly prohibits *any* contact with the media. Since these assertions are without any basis in fact and contrary to governing law, the GC's exception should be overruled and the ALJ's decision as to Complaint Paragraph 7(a) should be adopted by the Board.

In his Amended Limited Cross-Exceptions, the GC also requests that the ALJ's notice be revised to require a nationwide notice posting. The requested remedy does not comport with the GC's cited case law, which limits posting to the facilities at which the violation occurred. The sole basis for this request is the GC's supposition that a tweet by Elon Musk on his personal Twitter handle is the same as a policy or unlawful rule and thus a nationwide posting is appropriate. There is no legal authority provided, and the GC cannot and did not point to any record evidence which would provide any underpinning for this wild supposition.

Likewise, the GC's request – raised here for the first time in his Cross-Exceptions – that Tesla direct Elon Musk to “delete” his tweet from his personal account (which allegedly contained a threat) is wholly unsupported by the GC's cited authority which only requires the employer to “rescind” emails. The GC did not point to any case law that would require a tweet be deleted. Nor is there any record evidence about deleting tweets, the effect that deleting a tweet might or might not have or what it would mean to rescind or retract a tweet.

Accordingly, the GC's Amended Limited Cross-Exceptions should be denied.

II. THE ALJ PROPERLY FOUND THAT TESLA'S CONFIDENTIALITY ACKNOWLEDGEMENT WAS LAWFUL

A. FACTUAL BACKGROUND

1. TESLA'S EMPLOYEES ARE GIVEN ACCESS TO SENSITIVE COMPANY-INTERNAL INFORMATION

Tesla is a technology and design company founded in 2003 and headquartered in Palo Alto, California. Among other products, it manufactures and assembles electric vehicles (EV) at its automobile production facility located in Fremont, California. Approximately 12,000 EV production employees worked there at the time of trial. (ALJD 4:18-20) Tesla is the first

successful American automotive start up since Ford began business in 1903. It is also the first company to bring EV's to the mass market.

Like most high-tech companies, Tesla's success is largely dependent on its ability to develop, control and make exclusive use of its confidential business information. Indeed, company-internal business information as to Tesla's technology, its business and financial plans and its approach to the market — all developed over time and at considerable cost — provide Tesla with a competitive advantage of considerable commercial value. (ALJD 12:6-11; Tr. 2014:19-2016:7) This is especially true since Big Auto began to enter the EV market in 2015. Moreover, the leakage or unauthorized disclosure of any internal information including information that may already been mentioned, discussed or even rumored in public about Tesla's production, its sales and its ability to amortize its infrastructure costs, to operate profitably and/or to meets its financial obligations is subject to SEC regulation and can directly affect the Company's stock price and its ability to attract and retain investment capital. *See, e.g., S.E.C. v. Clark*, 915 F.2d 439 (9th Cir. 1990)(misappropriation of confidential information constituted insider trading, lowering stock price, affecting company's market share and perpetrating fraud on shareholders). Additionally, the disclosure of information relating to rumored but unreleased product technology and unannounced feature changes is likely to depress or delay Tesla's sales if consumers defer buying an EV in anticipation of the Company's anticipated latest and greatest new innovations. (ALJD 12:6-11; Tr. 2014:19-2015:5)

2. EVEN THOUGH TESLA SHARES BUSINESS SENSITIVE INFORMATION WITH ITS WORKFORCE, IT TAKES STEPS TO KEEP THAT INFORMATION CONFIDENTIAL AND TO PREVENT THE LEAKING OR DISCLOSURE OF SAID INFORMATION TO THIRD PARTIES

Tesla strives to promote an open workplace culture of trust, high performance, personal responsibility/commitment and transparency. Indeed, Tesla wants its workers to be stakeholders who are committed to the Company's success and share in its mission of accelerating the world's transition to clean sustainable energy generation, storage and consumption. Thus, unlike more

traditional hierarchical companies who may share little business sensitive information with their production workers, Tesla encourages open and multidirectional dialog between worker and all levels of management and often shares internal business sensitive information with its workers as a way of keeping them abreast of critical issues and expeditious problem solving. Though openly shared and discussed with workers, such internally circulated information is still considered confidential. (R-5)

In order to protect such business-sensitive information from disclosure outside the Company, Tesla requires employees to enter into and abide by the Company's Proprietary Information and Inventions Agreement (PIIA) as a condition of their initial hire and continued employment. Under the PIIA, every employee agrees to "hold in strictest confidence" and to "not disclose, use, lecture upon or publish any of the Company's Proprietary Information" which is defined, in pertinent part, as follows:

[A]ny and all confidential and/or proprietary knowledge, data or information of the Company, its parents, subsidiaries, or affiliated entities, customers and suppliers, or any other party with whom the Company agrees to hold . . . in confidence, including but not limited to information relating to products, processes, know-how, designs, formulas, methods, developmental or experimental work, improvements, discoveries, inventions, ideas, source and object codes, data, programs, other works of authorship, and plans for research and development.

(R-4; ALJD 12:1-5)³

Consistent with the PIIA, Tesla issues post-hire policy statements that are made available to all employees on the Company's intranet that remind Tesla associates of their confidentiality agreement and the continuing need for confidentiality. For instance, Tesla's Code of Business Conduct and Ethics applicable to the conduct of all Company employees, provides that:

"Employees . . . must maintain the confidentiality of confidential information entrusted to them by the Company . . . except when disclosure is authorized by the Legal Department or required by laws or regulations. Confidential information includes all non-public information that might be of use to competitors, or harmful to the Company . . . if disclosed. . . . In connection with this obligation,

³ The GC does not question the lawfulness or facial validity of the PIIA.

every employee should have executed a confidentiality agreement when he or she began his or her employment with the Company.

(R-6; ALJD 12:1-5)⁴

Likewise, Tesla's Communication Policy points out that Tesla often functions under a spotlight and that employees are likely to be approached by reporters, analysts or researcher for information or commentary about the Company. For the purpose controlling that media information, the policy reminds workers of the "confidentiality agreement" they "signed" when they "joined Tesla" and of their continuing obligation to hold Tesla's information in the strictest confidence, stating that employees are not to share confidential or privileged information about Tesla with anyone outside the Company.⁵ (R-7; ALJD 12:1-5) The policy also designates specific people who are authorized to speak to the press on the Company's behalf and directs those who are not authorized to speak for the Company to "be careful with your conversations" and to "not confirm, deny or comment on information that has not already been publicly released" by the Company.⁶ (*Id.*)

Tesla takes informational security seriously and routinely seeks to enforce the PIIA and the aforesaid policies and investigates leaks, primarily relying on its IT team to uncover information identifying employees who take protected information and disclose it publicly. (Tr. 2018:9-2019:24) However, such information is not always available. However, where it is and Tesla has cause to believe that an employee has violated their confidentiality obligation, the Company has disciplined/terminated the identified worker and taken other action. (Tr. 2019:25-2020:16) For instance, in one notable case, an outgoing or ex-Tesla employee hacked into his

⁴ The GC does not question the lawfulness or facial validity of Tesla's Code of Business Conduct and Ethics.

⁵ The GC does not question the lawfulness or facial validity of the Tesla's Communication Policy.

⁶ At the same time, however, the Communications Policy contains a carve out allowing employees to speak with the media on their own behalf as to matter that are not business sensitive or confidential, stating that the Company's policy is *not* meant to discourage personal self-expression and asks that when Tesla employees use social media or speak about the Company, they make it clear that they are speaking on their own behalf and not speaking for or on behalf of Tesla.

manager's email account to access and obtain technical data about vehicles which he, in turn, leaked to the media. (Tr. 202:17-2021:9) After determining this former associate to be the source of the stolen information, Tesla contacted turned the matter over to the FBI who arrested and prosecuted him for theft. (*Id.*)

3. DESPITE TESLA'S MANY EFFORTS TO PREVENT LEAKS, SENSITIVE COMPANY-INTERNAL BUSINESS INFORMATION GETS LEAKED TO PERSONS/THIRD PARTIES OUTSIDE THE COMPANY (THE BLOOMBERG LEAK)

On August 29, 2016, Elon Musk sent an internal email to Tesla's entire workforce, worldwide. (R-37; ALJD 11:40-46) Though not marked confidential, the message was chock full of private business sensitive information *not* for public consumption. (Tr. 2011:17-24, 2012:4-8) Entitled "Third Quarter Rally," the email apprised recipients of the criticality of a strong fiscal quarter ending September 30 and the need to ramp up performance, contain costs and rally before September 30 quarterly close in order to achieve positive cash flow and GAAP profitability. (R-37) The email explained that Q3 2016 would be the last chance for the Company to show investors that it could be cash positive and profitable before the new Model 3 went into production since Model 3 capital expenditures were expected to force the Company back into a negative position until late 2017. (Tr. 2009:17-2010:1; R-37) The August 29 message also explained that a positive Q3 was critical since a profit would make it easier for the Company to raise additional cash in Q4 2016 to complete the Model 3 vehicle factory and Gigafactory 1 at Sparks, Nevada. (*Id.*)

Despite the business sensitive nature of this internal communications, it was not kept private. To the contrary, shortly after it issued internally, it was leaked by an unknown person to the media, appearing word for word in Bloomberg on September 6. (Tr. 2008:24-2009:5; R-38; ALJD 11:40-43) This was not the first time that such non-public business sensitive information had been leaked to the press. (ALJD 11:40-43) Indeed, leaks had occurred on multiple occasions in the past and remained a nagging problem at Tesla. (Tr. 2005:16-2006:24; ALJD 11:40-46) More often than not, leakers or the sources of leaks went unidentified, leaving the

Company with no viable remedy. (Tr. 2019:12-2020:4) Nonetheless, on several occasions, senior managers issued memos to the employees trying to impress upon them the Company's confidentiality concerns and reminding them to not leak such non-public business sensitive information. (Tr. 2018:22-2019:9; ALJD 11:40-12:6)

For example, on February 10, 2015, Tesla's then General Counsel, Todd Maron, issued an email to "Everybody" re: Leaks, cautioning them against leaking internal email to the media and explaining that keeping such internal messaging in house was extremely important so that "we can have a frank and open internal dialogue about how to solve problems" and noting that "[i]f a concern cannot be raised without wondering whether it will be leaked out of context or blown up in the media, then free speech is fundamentally impaired within Tesla." (R-39; ALJD 12:1-6)

Likewise, later on in March 30, 2016, Tesla's then Vice President of Human Resources, Mark Lipscomb, issued an "Important Reminder" to all Tesla employees in which he emphasized the absolute criticality that we maintain strict confidentiality on all internal materials, noting that "[t]he interest level in Tesla is at an all-time high and as a result, media, analysts, and other outsiders are looking to find out anything they can about our company, products, and more" and that "[a]ny leak can threaten the success of a product launch and have a negative impact on the company." (R-40; ALJD 12:1-5) Thus, according to Lipscomb, Tesla had a "zero tolerance policy when it comes to violations of confidentiality . . . [to protect] all of the hard work being performed by everyone at Tesla." (*Id.*)

Despite these and other memos calling for employees to honor their confidentiality commitments, leaks continued to occur with the September 6 Bloomberg being the latest, forcing Tesla to look for some new solution to the persistent problem of leaks.

**4. AS A RESULT OF THE BLOOMBERG LEAK, TESLA'S
GENERAL COUNSEL DIRECTS THAT A CONFIDENTIALITY
ACKNOWLEDGEMENT REMINDING EMPLOYEES OF THEIR
CONFIDENTIALITY OBLIGATIONS AND CALLING ON THEM
TO REAFFIRM THEIR PRIOR CONFIDENTIALITY
COMMITMENTS BE DRAFTED AND DISTRIBUTED TO THE
ENTIRE TESLA WORKFORCE**

After the September 6 Bloomberg leak, Tesla's Todd Maron tasked certain lawyers on his staff with the drafting what was supposed to be a simple, one page, plainly and non-legalistically worded document to be given to and signed by all Tesla employees in which employees would be reminded of and acknowledge their confidentiality obligations and renew the earlier confidentiality vows they made to the Company. (Tr. 2006:25-2007:8, 2009:6-16, 2027:17-2028:7; ALJD 11:40-48; R-42) Among those tasked with drafting the acknowledgement were Vice President, Legal, Jonathan Chang and Deputy General Counsel, Yusuf Mohamed. (Tr. 2007:3-8) Over the remainder of September and into early October, they and other Tesla lawyers worked to develop a draft document that would meet Maron's requirements – a simple one page acknowledgement written in plain, simple English that could easily be read and understood by non-lawyers and that would drive home the seriousness of leaking non-public business sensitive information. (2029:13-19) By the end of the first week of October, that draft was close to being done, but still not in final form nor ready for publication. However, events in the form of yet another leaked internal document – one publishing an internal email from Musk concerning the discounting of cars – overtook the lawyer's work and compelled the Company to issue the new Acknowledgement in a less than final form on October 10. (Tr. 2029:25-2030:17, 2034:14-2035:5) A day later, that initial acknowledgement draft was amended and put into final form, becoming the Confidentiality Acknowledgement that now serves as the basis for General Counsel's allegations in Paragraph 7(a) of the Amended Second Complaint. (Tr. 2034: 14-2035:5)

**5. BEGINNING ON OCTOBER 11, TESLA PUBLISHES A
CONFIDENTIALITY ACKNOWLEDGEMENT AND ASKS
EMPLOYEES TO SIGN IT**

In October and November 2016, Tesla asked employees to sign a Confidentiality Acknowledgement. (ALJD 10:43-45) The Confidentiality Acknowledgement states⁷:

In response to recent leaks of confidential Tesla information, we are reminding everyone who works at Tesla, whether full-time, temporary or via contract, of their confidentiality obligations and asking them to reaffirm their commitment to honor them.

These obligations are straightforward. Provided that it's not already public information, everything that you work on, learn about or observe in you[r] work about Tesla is confidential information under the agreement that you signed when you first started. This includes information about products and features, pricing, customers, suppliers, employees, financial information, and anything similar. **Additionally, regardless of whether information has already been made public, it is never OK to communicate with the media or someone closely related to the media about Tesla, unless you have been specifically authorized in writing to do so.**

Unless otherwise allowed by law or you have received written approval, you must not, for example, discuss confidential information with anyone outside of Tesla, take or post photos or make video or audio recordings inside Tesla facilities, forward work emails outside of Tesla or to a personal email account, or write about our work in any social media, blog, or book. If you are unsure, check with your manager, HR, or Legal. Of course, these obligations are not intended to limit proper communications with government agencies.

The consequences of careless violation of the confidentiality agreement, could include, depending on severity, loss of employment. Anyone engaging in intentional violations of the confidentiality agreement will be held liable for all the harm and damage that is caused to the company, with possible criminal prosecution. These obligations remain in place even if no longer working at Tesla.

By acknowledging, I affirm my agreement to comply with my confidentiality obligations to Tesla. I also represent that at no time over the past 12 months have I disclosed any Tesla confidential information outside of Tesla unless properly authorized to do so.

⁷ The text that is the subject of the GC's exception appears at the end of the second paragraph. While boldfaced here to make it easier for the reader to find it, it was not boldfaced in the original document distributed to the Tesla workforce.

(R-11; ALJD 11:1-12:20)

In October, then HR Director for Production and Supply Chain Josh Hedges advised the Fremont HR team that they needed to remind everyone of the confidentiality agreement they signed when they were hired and that all employees would be asked to sign the Confidentiality Acknowledgement in the presence of a HR representative. (ALJD 12:24-30) Thereafter, HR partners met with different groups of employees to ask them to sign the Confidentiality Acknowledgement and advised employees they were being asked to sign the document in response to recent information leaks at the Fremont facility. (ALJD 12:24-40, fn. 23) Later, in November, Lipscomb sent an email to all employees asking them to sign the Confidentiality Acknowledgment electronically in their Workday inbox. Lipscomb reiterated that Tesla needed this affirmation to reinforce the importance of confidentiality as any leaks “can have a negative impact on our company.” (ALJD 12:32-40)

B. LEGAL ANALYSIS

1. THE ALJ PROPERLY FOUND THAT REASONABLE EMPLOYEES WOULD UNDERSTAND THE CONFIDENTIALITY ACKNOWLEDGEMENT TO BE LIMITED TO PROPRIETARY INFORMATION

The GC claims that a specific clause in Tesla’s Confidentiality Acknowledgment, designed to limit Tesla employees from disclosing proprietary information to the media (even if leaked) and/or speaking to the media on Tesla’s behalf, is facially unlawful. The GC takes the excerpted text out of context and asks the Board to read it in isolation and without regard to its inclusion and placement in the Confidentiality Acknowledgement and circumstances surrounding that document’s October 2016 issuance. This is at odds with *Boeing* and the Board’s recent holdings finding that confidentiality agreement clauses are facially lawful.

In *Boeing*, the Board overruled the “reasonably construe” test delineated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) and set a new standard for determining the

lawfulness of facially neutral work rules and when such rules, reasonably interpreted will be found to unlawfully interfere with, restrain or coerce employees in the exercise of their Section 7 rights. Under the *Boeing* test, the Board will no longer read text in isolation nor disregard the context within which a given text is used. Nor will the Board construe ambiguous language against the Employer for in *Boeing*, the Board observed that reasonable employees do not view every employer policy through the prism of the Act, but rather, interpret work rules as those rules apply to the “everydayness” of their jobs. *LA Specialty Produce Company*, 368 NLRB No. 93, slip op. at 2 (2019). Thus, when evaluating a facially neutral policy, rule or handbook provision under the *Boeing* standard, the Board will first reasonably interpret the text from the prism of “everydayness” and decide whether that rule, as interpreted, potentially impacts rights protected by the Act as well as the legitimate justifications associated with the rule. *Id.*, slip op. at 7 (2020).

The excepted to provision in Tesla’s Confidentiality Acknowledgement is a lawful *Boeing* Category 1(a) rule under the Board’s recent holdings addressing confidentiality. In *Argos USA LLC*, 369 NLRB No. 26, slip op. at 2-3 (February 5, 2020), for example, which the GC ignores, the Board upheld a confidentiality agreement requiring employees not to disclose various types of confidential information including “earnings” and “employee information” finding that the text to be a lawful Category 1(a) rule as it did not expressly prohibit employees from discussing or disclosing wages, hours and working conditions. Further, the Board looked at the full context of the confidentiality agreement and held that (a) it applied only to the employer’s proprietary information and (b) did not extend to individual employee’s wages or contact information. *Id.* In doing so, the Board refused to read the confidentiality agreement in isolation. Rather, it reasoned that the terms “earnings” and “*employee information*” were included in a “list of categories of obviously proprietary information” and that the paragraphs following the definition paragraph contained information about “inventions, business improvements, patents, and third-party confidential information.” Accordingly, the Board concluded that the General Counsel had failed to sustain its burden in showing that an

objectively reasonable employee would interpret the confidentiality agreement, when read as a whole, to potentially interfere with Section 7 rights. Thus, the Board declined to even analyze the general and specific legitimate interests justifying the confidentiality agreement. *Id.*

Likewise, in *National Indemnity Company*, 368 NLRB No. 96, slip op. at 2-3 (2019), which the GC fails to distinguish, the Board reversed an ALJ finding a Code of Conduct to be unlawful that required employees to “maintain the confidentiality of confidential information entrusted to them.” The Board reasoned that even though the Code of Conduct failed to identify all of the information that the employer might consider to be confidential, the text in question did not expressly reference employee terms and conditions of employment, much less restrict their discussion with anyone and instead required that employees simply maintain the confidentiality of “non-public” information that might be of use to competitors or harmful to the Company or its customers if disclosed. According to the Board, reasonably interpreted from the perspective of an objectively reasonable employee who is aware of their legal rights but who also interprets work rules as they apply to the “everydayness” of their jobs, the text attacked referred only to confidential information which the employer has a legal right to conceal. *Id.* at 2-3 Hence, the Code provision was found to be a lawful *Boeing* Category 1(a) rule, its alleged vagueness and over-breadth notwithstanding.

Similarly, in *LA Specialty*, 368 NLRB No. 93, slip op. at 1-4, the Board overturned an ALJ finding that an employer’s confidentiality rule was unlawful that prohibiting the disclosure of confidential and proprietary information including but not limited to client/vendor lists because the rule required employees to protect the confidentiality of client and vendor lists, but said nothing about talking to clients or vendors with respect to Section 7 matters. Further, the Board parted ways with an ALJ finding and upheld a rule which, like the excepted to text here, speaks of situations in which employees are approached by the news media and which only prohibits employees from speaking on the employer’s behalf. *Id.* at 4-5. As here, a parsing of the text’s wording might suggest that employees may never speak to the media on behalf of themselves. But the Board observed that it must refrain from reading particular phrases in

isolation and that, in any event, the phrase under attack was qualified by the text when read as a whole and that, when read in that broader context, the language in question lawfully signified that employees were not authorized to act as company spokespersons. *Id.* Thus, as here, the Board concluded that the GC had misread the text under attack to prohibit employees from *ever* speaking to the media and was a lawful *Boeing* category 1(a) rule. Accordingly, consistent with *Argos* and *National Indemnity Company*, the Board found it unnecessary to even analyze the general and specific legitimate interests justifying the workplace rules. *Id.*

Contrary to the above referenced cases (and consistent with the rejected “reasonably construe” test found in *Lutheran Heritage*), the GC takes the text out of context and asks the Board to read it in isolation without regard to its inclusion and placement in the Confidentiality Acknowledgement and circumstances surrounding that document’s issuance. Indeed, according to the ALJD not excepted to by the GC, the Confidentiality Acknowledgement *only* applies to Tesla’s “*proprietary information.*” (ALJD 14:25-27) (*Italics added*) Thus, neither it nor the excepted text makes any reference or has any application to employee wages, hours or working conditions or to unionization or to an employee speaking to the press as to such matters. Indeed, this is evidenced by the express carve out language that follows immediately after the excepted to text which exempts from otherwise confidential information, the discussion or disclosure of information that is “otherwise allowed by law,” meaning to any employee who is familiar with their rights under the Act that information pertaining to employee wages, hours, working conditions or to unionization are not subsumed within the excepted to text and that employees are perfectly free to discuss such topics with the press, the Confidentiality Acknowledgement notwithstanding.

When properly read in the context of the Confidentiality Acknowledgement, a document that stated that it was aimed at discouraging leaks to the media of internal business sensitive information and in which employees are merely reminded of their earlier lawful non-disclosure commitments and asked to reaffirm those earlier vows, the isolated, excepted to text must also be read as being limited to such confidential information. (*Id.*) Further, based on Tesla’s PIIA and

Communications Policy, included within those prior lawful vows are the employees' promise to not to disclose Tesla's confidential information to persons/parties outside Tesla including the media as well as their commitment to neither act as nor portray themselves as a Company media spokesperson with respect to confidential information unless they are specifically authorized to do so. (R-4; R-7) Measured in this light, a plain reading of the excepted to text shows that it has nothing to do with Section 7 rights and it is nothing more than a reminder to employees that they have agreed not to share or discuss confidential information with the media even if that confidential information may have been leaked to the public unless they are specifically authorized in writing to do so. As the Confidentiality Acknowledgement states, this is true "regardless of whether the information has already been made public" because, even if a leak occurs, Tesla justifiably seeks to limit further exposure of proprietary information by prohibiting unauthorized employees from speaking to the media about such issues. This is particularly clear from the following language in the Confidentiality Acknowledgement:

- The opening sentence, which states that the policy is being circulated "[i]n response to recent leaks of confidential Tesla information." (Before the media clause)
- "This includes information about products and features, pricing, customers, suppliers, employees, financial information, and anything similar." (Before the media clause)
- Unless otherwise allowed by law or you have received written approval, you must not for example, discuss confidential information with anyone outside of Tesla, take or post photos or make video or audio recording inside Tesla facilities, forward work emails outside of Tesla or to a personal email account, or write about our work in any social media, blog, or book." (After the media clause)

Thus, when read through the prism of the everydayness of the Tesla workplace, the excepted to text does not implicate, much less, interfere with Section 7 rights. Accordingly, the ALJ was

correct when she concluded that reasonable employees would understand the Confidentiality Acknowledgement, including the excepted to text, to be limited to “proprietary information.” (ALJD 14:25-27)

The GC engages in no analysis of *Argos* and *National Indemnity Company* in its Brief in Support of Cross-Exceptions. Likewise, while the GC feebly attempts to distinguish the media policy in *LA Specialty*, it amounts to a distinction without a difference. In *LA Specialty*, the Board refused to focus on a single line of the media policy at issue, and instead, found that the policy as a whole made clear that employees were prohibited from speaking to the media on behalf of the company. *Id.* In reaching its decision, the Board in *LA Specialty* reasoned that reading certain provisions in isolation would render other parts of the policy superfluous – which the Board refused to do. *Id.* Focusing, as the GC does, only on the language stating “it is never OK to communicate with the media or someone closely related to the media about Tesla,” would erroneously render other parts of the acknowledgement meaningless. For example the following sentence in the Confidentiality Acknowledgment makes clear that the prohibition on speaking to the media is limited to proprietary information: “[u]nless otherwise allowed by law or you have received written approval, you must not, for example, discuss *confidential information* with anyone outside of Tesla, take or post photos or make video or audio recordings inside Tesla facilities ... or write about *our work* in any social media, blog, or book.” (Italics added). Further, Tesla’s Confidentiality Acknowledgment refers to employees needing “authorization” to speak to the media concerning certain subjects, namely Tesla’s proprietary information. *LA Specialty* held that this type of language signals that the spokesperson may speak on the company’s behalf – but does not limit *on its face* an employee’s ability to discuss their own wages and terms and conditions of employment with the media. *Id.*

The GC offers two reasons why *LA Specialty* does not apply in this case. Both reasons are unavailing. First, the GC argues that the language in the Confidentiality Acknowledgment is an unlawful “blanket prohibition on contact with the media.” However, the language the GC is referencing, “it is never OK to communicate with the media or someone closely related to the

media about Tesla” is almost identical to the language that the Board found lawful in *LA Specialty*. The provision in *LA Specialty* stated “[e]mployees approached for interview and/or comment by the news media, cannot provide them with any information.” *Id.* slip op. at 4. There is no meaningful distinction between being “approached” by the news media for interview/comments versus “communicating” with the news media under the Confidentiality Acknowledgement. *LA Specialty*, therefore directly undermines the GC’s argument – given that the Board found such similar language was not a “blanket prohibition” on Section 7 activity, but in fact a facially lawful policy.

Second, the GC argues that the “authorized and designated” language in *LA Specialty* was a “signal to a reasonable employee that the rule merely applied to speaking on [the company’s] behalf.” However, the GC conveniently overlooks the fact that similar language also appears in the Confidentiality Acknowledgment (“unless you have been specifically authorized in writing to do so”), providing the same “signal” to Tesla’s employees.

Further, the fact that the text proscribes workers from serving as a company spokesperson with respect to information that may already have been made public does not render the text unlawful since there is no Section 7 right to act as a company spokesperson. Further, let it not be forgotten that the whole purpose of the Confidentiality Acknowledgement was to stem the leaking of confidential Tesla information, rendering the text’s mention of information “already made public” an obvious reference to confidential information that may be leaked. (GC-31; R-14) A rule that bans the unauthorized disclosure of such purloined confidential information merely because it is now “public” can’t possibly be deemed unlawful since a finding of unlawfulness would encourage violation of the rule and compromise an employer’s right to demand and expect the maintenance of confidentiality.

Finally, before Tesla issued the text now under attack, it and its employees agreed that the Company’s confidential information would be kept confidential and that its employees would not act as a company spokesperson without being given authorization to do so. (R-4; R-7) Tesla’s October 2016 Confidentiality Acknowledgement of which the excepted to text is an

integral part did nothing more than to remind Tesla workers of their prior commitments to hold internal business-sensitive information confidential and to refrain from presenting themselves to the media as a Tesla spokesperson. (GC-31; R-14) Given that plain meaning and under the *Boeing* standard, the sentence attacked by the GC in his Cross-Exception should be found to be a lawful Category 1(a) rule. The ALJD's findings with respect to the Confidentiality Acknowledgement including the excepted to text should be adopted and the GC's limited Cross-Exception attacking those findings should be overruled.

C. EVEN IF THE EXCEPTED TO LANGUAGE IN THE CONFIDENTIALITY AGREEMENT INFRINGES ON EMPLOYEES' SECTION 7 RIGHTS, THE ALJ PROPERLY FOUND THAT TESLA HAD LEGITIMATE BUSINESS JUSTIFICATIONS TO OVERRIDE THOSE RIGHTS

As demonstrated above, the Confidentiality Acknowledgement including the excepted to provision, as reasonably interpreted, did not potentially affect Section 7 rights. But even if it did, the ALJ found that Tesla presented legitimate business justifications to override those employee rights. (ALJD 14:29-45) Indeed, under *Boeing*, even if an employer's rule, as reasonably interpreted, is found to potentially interfere with Section 7 rights, the rule may still be supported by the employer's legitimate business interests in which case, the Board will be compelled to attempt to strike a balance between competing employee rights and an employer's interests in maintaining the rule. Where that balance is found to favor the employer's interests over the potential interference with Section 7 rights, the employer's rule at issue will still be found lawful within *Boeing* Category 1(b), its potential possible or potential impact on Section 7 rights notwithstanding. *LA Specialty, supra.* slip op at 3.

As demonstrated above, the Confidentiality Acknowledgement including the excepted to provision relating to media contact, as reasonably interpreted, did *not* potentially affect Section 7 rights. But even assuming, *arguendo*, that it did, the ALJ found that Tesla presented legitimate business justifications sufficient to override potential employee rights. (ALJD 14:29-45) This finding is amply supported by the uncontroverted and credited testimony of Jonathan Chang who

testified as to the problems of leaked confidential information plaguing Tesla and how and why it was necessary for Tesla to issue the Confidentiality Acknowledgement in October 2016. (Tr. 1983:25-1994:2, 2001:23-2035:7, 2040:21-2042:20) Suffice it to say, an employer's interest in protecting its internal business sensitive information including that which is shared with its employees is both real and substantial. And where that employer has entered into Proprietary Inventions Agreements and published policies proscribing the disclosure or publication of confidential information outside the Company, it is reasonable for an employer to expect employees to honor their vows of confidentiality. Yet the GC turns a blind eye to this reasonable expectation and, in the guise of questioning the substantiality of Chang's testimony, to backhandedly ask the Board to disregard the ALJ's findings crediting Chang's testimony and to simply ignore Tesla's proven interest in preserving the confidentiality of that information and discouraging the leaking of that information to the press and persons outside the Company. Under *Boeing*, the Board may not do this.

Moreover, an employer's interest in preserving such confidentiality clearly preponderates over the employees' interest in being able to use or disclose such internal business sensitive information insofar as employees have no right to use or disclose confidential business information while engaged in Section 7 activity. Indeed, as the Board recently noted in *Macy's, Inc.*, 365 NLRB No. 116, slip op. at 4 (2017), employees may be lawfully disciplined or discharged for using for organizational purposes information improperly obtained from their employer's private or confidential records. This is because the Act does not protect employees who use or divulge information that their employer lawfully may conceal. *International Business Machines Corp.*, 265 NLRB 638 (1982).

Here, the undisputed and specifically credited record evidence shows that by its issuance of the October Confidentiality Acknowledgement, Tesla sought to protect the future confidentiality of its internal business sensitive information that it has a legal right to conceal from the public — including that information which was shared with its employees. Accordingly, even if its employees *arguably* had some potential right to make use of or to

disclose said confidential information while engaged in Section 7 conduct (which they didn't), that arguable Section 7 right would still be outweighed by the employer's interest in keeping that information confidential, rendering the Confidentiality Acknowledgement including its media contact provision a lawful policy within the meaning of *Boeing* Category 1(b). GC's exception to the ALJ's finding that Tesla Confidentiality Acknowledgement was supported by overriding legitimate business should, therefore, be rejected. The ALJ's finding on this point should be adopted by the Board.

III. THE GC'S REQUEST TO REVISE THE ALJ'S REMEDY TO REQUIRE A NATIONWIDE POSTING AND "DELETION" OF A TWEET IS NOT SUPPORTED BY FACT OR LAW

A. THE ALJ CORRECTLY LIMITED ANY NOTICE POSTING TO THE FREMONT FACILITY BECAUSE THE ONLY ALLEGED VIOLATIONS WERE AT THE FREMONT FACILITY

The GC requests a nationwide notice posting, based on the assertion that the "Board generally directs the posting of a notice 'to facilities at which the violations were committed.'" (GC's Brief ISO Cross-Exceptions, p. 17) Yet, the ALJ found: "I do not order a notice reading at the Sparks facility as no violations of the Act occurred there."⁸ (ALJD 78:18-19) The *only* notice posting required by the ALJ is at the "facility in Fremont, California." (ALJD 80:19-20) No other result is possible because the ALJ's decision does not make any jurisdictional or factual findings regarding the existence of Tesla facilities other than the Fremont Facility and the Sparks facility. (ALJD, 3:9-19) Nor could the ALJ have made any such findings because the operative complaints only contained allegations relating to the Fremont Facility and the Sparks Facility and did not identify any other specific facilities.⁹

⁸ None of the GC's Cross-Exceptions are directed at any allegations that allegedly occurred at the Sparks facility. Thus, the ALJ's determination as to the sole location of alleged violations is final: the Fremont Facility.

⁹ Both operative complaints contain similar allegations and only specifically identify the Fremont Facility and the Sparks Facility:

At all material times, Respondent, a Delaware technology and design corporation with its headquarters in Palo Alto, California, with facilities throughout the United States,

Board precedent is clear; any notice posting should be limited to the Fremont Facility. *See, e.g., AT&T*, 362 NLRB 885, 885 n.3 (2015)(“no basis on which to order nationwide notice posting, as the Respondents here operate only in California and Nevada, and this was the alleged and admitted scope of their operations”); *Fry’s Food Stores*, 361 NLRB 1216, 1216 n.2, 1218 (2014)(notice posting limited to one location because “case involves discrete violations at only one facility”); *Promedica Health Sys., Inc.*, 343 NLRB 1351, 1351 n.2 (2004)(Respondents “not required to post a notice at its Goerlich Center, where no violations were committed”). Indeed, even the GC’s cited case law recognized additional limitations on notice posting when the Board reversed the unit-wide posting requirement “because there is insufficient evidence to indicate that the four violations found here were committed pursuant to a company policy” and required the posting only at the facilities where the violations occurred. *Consolidated Edison Company*, 323 NLRB 910-912 (1997).

Tellingly, the Board has prevented the GC from expanding the scope of the complaint’s allegations in an attempt to obtain a broader notice posting. In *Boch Honda*, 362 NLRB 706, 708 (2015), for example, even though the case involved an employee handbook, the Board limited the notice posting to the specific facilities alleged in the complaint, which only identified a specific facility in Norwood, Massachusetts. During trial, the GC elicited testimony that the employee handbook was used at other dealerships and stores that were also owned by Boch. *Id.* Based on the trial testimony, the GC moved to amend the complaint to add the additional dealerships and retail stores, but the motion was denied. *Id.* Because there was no “litigated

including *an automotive manufacturing facility in Fremont, California, and an automotive battery facility in Sparks, Nevada*, has been engaged in the design, manufacture, and sale of electric vehicles and energy storage systems.” (GC Ex. 1(iii), ¶2(a)) (emphasis added); and

At all material times, Respondent, a Delaware technology and design corporation with its headquarters in Palo Alto, California, *an automotive manufacturing facility in Fremont, California (the Fremont Facility), and an automotive battery facility in Sparks, Nevada (the Sparks Facility)*, has been engaged in the design, manufacture, and sale of electric vehicles and energy storage systems. (GC Ex. 1(jj), ¶2(a)) (emphasis added).

finding that the Respondent was responsible for the implementation and maintenance of the same handbook policies at other ‘Boch’ entities,” the Board limited the notice posting to the named Respondent. *Id.* The same result is amply warranted here.

B. THE ALJ MADE NO FINDINGS THAT THE TWEET WAS AKIN TO AN UNLAWFUL RULE OR POLICY AND ANY REMEDY BASED UPON THIS FALSE SUPPOSITION MUST BE DENIED

Notwithstanding the ALJ’s specific finding that the only violations occurred at the Fremont Facility, the GC attempts to skirt these issues and request a nationwide notice posting by suggesting that the tweet should be treated as “an unlawful rule or policy [which] is maintained on a nationwide basis.” (GC’s Brief ISO Cross-Exceptions, p. 17) The GC’s conjecture is not confirmed by any cited authority, and there are no factual findings that offer any corroboration.

The GC did not identify Twitter (or the tweet) as a policy or a rule. Instead, the GC plainly defined Twitter as a “micro-blogging social media platform.” (GC’s Post Hearing Brief, p. 23) While Twitter might be an application that is available throughout the United States to those who view or access it, there is no record evidence whatsoever that it is a “rule or policy” that is “maintained on a nationwide basis” by Tesla. To the contrary, the parties stipulated¹⁰ that *Twitter* maintains Twitter accounts through which users may send tweets. (Jt.-4, #1, 5) Furthermore, the parties stipulated that the tweet at issue was sent from Elon Musk’s *personal* Twitter account (@ElonMusk). (Jt.-4, #13) This is a separate and distinct account from Tesla’s Twitter Account. (Jt.-4, #13, 16) Tesla’s Twitter account has a completely different handle (@Tesla). (Jt.-4, #16) The Tesla Twitter account is the only account that Tesla uses “to make statements on behalf of Respondent.” (*Id.*) Therefore, the parties’ stipulation makes clear that

¹⁰ Joint Exhibit 4 contains the parties’ stipulations to facts relating to the tweet allegations. The GC stipulated to all the facts contained in Joint Exhibit 4 and cannot now be heard to undercut or contradict them. Furthermore, the GC did not put on any evidence – other than Joint Exhibit 4 – about how Twitter works, Twitter accounts, and the dissemination of tweets.

the account from which the tweet was sent is not one maintained by Tesla and is not the account that Tesla uses to make statements on behalf of Tesla.

Next, the GC attempts to suggest that the tweet was sent nationwide by incorrectly representing (p. 17) that the alleged “threat of a loss of benefits was published to the thousands of employees who work under him at all of Respondent’s facilities *and* to the millions of statutory employees within the jurisdiction of the United States.” The only cited support for this claim is Joint Exhibit 4. But Joint Exhibit 4 does not contain any mention whatsoever of any Tesla facilities or their geographic location or any statutory employees. Nor does Joint Exhibit 4 identify *any employee* to whom the tweet was allegedly published, much less corroborate the GC’s assertion that it was published to “thousands of employees” and “millions of statutory employees in the United States.” (GC Brief ISO Cross-Exceptions, p. 17) Quite the opposite, the only stipulated fact regarding dissemination of the tweet was “it is not possible to determine the full extent to which Elon Musk’s tweets, as set forth in GC Exhibits 38, 36, and 69, were republished or otherwise disseminated.” (Jt.-4, #19)

The actual facts contained in Joint Exhibit 4 eviscerate the GC’s position. Joint Exhibit 4 establishes that all the responses to the tweet that the GC relies upon (contained in GC Exhibit 69), were from individuals *who were not employed by Tesla*. (Jt.-4, #6-12) The parties did not stipulate that *any* Tesla employees or Tesla statutory employees viewed or saw the tweet. (Jt.-4) Thus, the GC’s asserted factual underpinning is without any merit and is contradicted by the parties’ stipulated facts. The GC did not present witnesses or documentary evidence that *any Tesla statutory employee* saw any of the tweets in GC Exhibit 69, except for Jose Moran. (Tr. 814:19-21, 815:14-19, 822:23-827:20) Therefore, under the GC’s cited case law, notice posting would only be required at the facility where the alleged violation occurred, and the only record evidence that a statutory employee saw the tweet, is Jose Moran, who worked at the Fremont Facility. Hence, the ALJ correctly limited the notice posting to the Fremont Facility.

C. THERE IS NO LEGAL OR FACTUAL BASIS TO MODIFY THE ALJ'S REMEDY TO REQUIRE TESLA TO ORDER NON-PARTY ELON MUSK TO DELETE THE TWEET

For the first time, in its Cross-Exceptions, the GC requests that “Musk delete the tweet.” (GC Brief ISO Cross-Exceptions, p. 18) Neither the operative complaints nor the GC’s post-hearing brief made any such request. In fact, the GC’s requested remedies did not include the word “delete” and did not contain any request that the tweet be rescinded or retracted. (GC’s Post-Hearing Brief, pp. 106-110) The GC now states – without any factual or legal support – that “ordering Respondent to request that Musk delete the tweet containing the unlawful threat is akin to his retraction of the statement.” (GC Brief ISO Cross-Exceptions, p. 18) This bald assertion brings to light two distinct problems with this new request. First, Elon Musk, sent the tweet from his *personal* Twitter account – not Tesla’s separate Twitter account. (Jt.-4, #3, 13) Elon Musk is not a party to this case; Tesla is. Second, there is no evidence about whether or how a tweet could be deleted, rescinded or retracted or that deletion of a tweet would be equivalent to a “retraction of the statement” (p. 18) because the only evidence about Twitter is contained in Joint Exhibit 4.

Nor is there any legal authority for the requested deletion. The GC’s cited authority is *Chicago Teachers Union*, 367 NLRB No. 50 (2018). This case was not litigated; it was a default judgment because Respondent failed to file an answer to the complaint. 367 NLRB No. 50, slip op. at 1. The allegations in the complaint (taken as true) were that Respondent had a rule that employees were prohibited from conducting union business during work time. *Id.* The rule was enforced in an October 4, 2017 *email* from the Vice President but only against employees who had filed ULPs. *Id.* The Vice President sent a second email on January 18, 2018, that Respondent would retain legal counsel and pursue ULPs against the union. *Id.* at 2. The remedy ordered Respondent to “[r]escind” each of these emails. *Id.* *Chicago Teachers* specifically did not contain an order that the emails be *deleted*. Nor did the case involve a tweet or Twitter. Thus, it has no applicability here.

Accordingly, the GC's request that the Order include "an additional affirmative remedy requiring Respondent to delete the May 20, 2017 tweet containing the unlawful threat" and to include in the notice that "WE WILL have Elon Musk, Chief Executive Officer of Respondent, delete his May 20, 2018 tweet, which threatens you with loss of benefit if you vote in favor of the Union" should be denied. (GC Brief ISO Cross-Exceptions, p. 20)

IV. THE GC'S CROSS-EXCEPTIONS CONCERNING THE REMEDY AS TO JOSE MORAN'S AND RICHARD ORTIZ'S DISCIPLINE ARE MOOT

The GC's Moran and Ortiz-related Cross-Exceptions should be found moot upon the Board accepting Tesla's Exceptions and reversing the ALJ's findings of discrimination with their discipline.

V. CONCLUSION

Tesla respectfully requests that each of the GC's Amended Limited Cross-Exceptions be denied.

Dated: March 5, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: _____


MARK S. ROSS
KEAHN N. MORRIS

Attorneys for
TESLA, INC.

CERTIFICATE OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Four Embarcadero Center, 17th Floor, San Francisco, CA 94111-4109.

On February 27, 2020, I served a true copy of the document(s) described as:

RESPONDENT TESLA, INC.'S BRIEF OPPOSING THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

on the interested parties in this action as follows:

Catherine Ventola
E-mail: catherine.ventola@nlrb.gov
Christy Kwon
E-mail: christy.kwon@nlrb.gov
Edris W.I. Rodriguez Ritchie
E-mail: edris.rodriguezritchie@nlrb.gov
Field Attorney, Region 32
National Labor Relations Board
1301 Clay Street, Ste. 300N
Oakland, CA 94612-5224
T: (510) 671-3041

Margo Feinberg
E-mail: margo@ssdslaw.com
Daniel E. Curry
E-mail: dec@ssdslaw.com
Schwartz, Steinsapir, Dohrmann & Sommers, LLP
6300 Wilshire Blvd., Suite 2000
Los Angeles, CA 90048
T: (323) 655-4700

Jeffery Sodko
E-mail: jsodko@uaw.net
United Automobile, Aerospace and Agricultural Workers of America
AFL-CIO
8000 E. Jefferson Avenue
Detroit, MI 48214
T: (313) 926-5000

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address eruiz@sheppardmullin.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 5, 2020, at San Francisco, California.



Elena E. Ruiz